In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE CENTRAL RAILROAD COMPANY OF New Jersey, The Pennsylvania Railroad Company, and Twenty-one Other Common Carriers by Railroad, appellants, v. UNITED STATES OF AMERICA, APPELLEE, AND INTERSTATE COMMERCE COMMISSION, intervenor.	No. 436.

APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

BRIEF FOR THE UNITED STATES.

This is an appeal from an order of the District Court (Circuit Judge Davis and District Judges Rellstab and Bodine all concurring), sitting at Trenton, July 2, 1921, denying application of appellants for preliminary injunction in a suit to enjoin the order of the Interstate Commerce Commission in *American Creosoting Co.* v. *Director General, etc.* (61 I. C. C. 145). The appeal is authorized by Urgent Deficiencies Act, October 22, 1913 (38 Stat. 219, 220).

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STATEMENT OF FACTS.

Southern Classification territory embraces all of that area lying south of the Ohio River and a line drawn from near Huntington, West Virginia, to Norfolk. Official Classification territory embraces all of that area lying north of the Southern Classification territory, east of the Mississippi and to the north *via* Chicago and the western shore of Lake Michigan, including the southern peninsula of Michigan; thence *via* the Canadian boundary east to the Atlantic Ocean. Official Classification territory is divided into Central Freight Association territory, Trunk Line Association territory, and New England Freight Association territory. The first two are divided by a line running from Buffalo to Pittsburgh, to Charleston, and southward. The latter two are divided by the line which forms the western boundary of Vermont, Massachusetts, and Connecticut, excluding Long Island.

The trunk-line carriers operating from south to north, including all of the appellants, under the two classifications and in the territories indicated, have published and filed their joint and concurrent tariffs of rates and charges for the carriage in carloads of railroad ties, telegraph cross arms, and wood paving blocks. These commodities are purchased and consumed in large quantities by the railroad companies, telegraph companies, and municipalities, respectively.

Creosoting-in-transit is a privilege granted by carriers by which the ties, cross arms, and blocks

are first carried from point of origin to a point where is located a creosoting plant, at which the commodity is unloaded and treated; after treatment the commodity is reloaded and carried to final destination on the through rate applicable from the original point of origin to final destination as if untreated. The principal creosoting plants are located at Simpson, Mississippi; Madison, Illinois; Indianapolis and Bloomington, Indiana; Toledo, Ohio; and Broadford Junction, Pennsylvania. "The creosoting-in-transit arrangement seems to be quite common except in trunk-line territory." (61 I. C. C. 148.)

American Creosoting Company, engaged in shipping carloads of railroad ties, cross arms, and wood paving blocks from points of production in Southern Classification territory to points of consumption in Official Classification territory, was by the carriers denied creosoting-in-transit at Newark, New Jersey, where its plant is located. The rate from Meridian, Mississippi, and grouped points, to Boston, on basis of which creosoting-in-transit is permitted at central territory points, is 43 cents; by being denied the privilege, American Creosoting Company is obliged to pay from the same points of origin 53.5 cents to Boston, or 39 cents to Newark and 14.5 cents beyond. The joint rate from Meridian to New York is 39 cents; the combination on Newark is 47 cents or 39 cents to Newark and 8 cents beyond, with a disadvantage to American Creosoting Company, as

compared to its Central Freight Association competitors, of 8 cents. On shipments from Meridian to Portland, Maine, American Creosoting Company's Central Freight Association territory competitors have an advantage of 18.5 cents. (61 I. C. C. 149.)

Competition is keen in the sale of creosoted wood products and especially so in wood paving blocks (61 I. C. C. 148). American Creosoting Company sold its creosoted products on a margin of profit of about 5 per cent. It lost many contracts at points in New England and in the State of New York on which it bid, because of the difference in rates due to creosoting-in-transit, which enabled its competitors to underbid. American Creosoting Company has refrained from bidding in the territory lying between Newark and Central Freight Association territory because of this disadvantage.

Within the past few years the general demand for creosoted products has considerably increased and American Creosoting Company's commercial output has decreased. It has a plant of 1,800 cars per year of 30 tons each. In each of the years 1917 and 1918 it shipped only 700 or 750 cars. Its inability to operate its plant to capacity is attributed entirely to lack of transit arrangements (61 I. C. C. 149).

After a full hearing on complaint the Interstate Commerce Commission found that American Creosoting Company was subjected to undue prejudice under section 3, and directed that tariffs be published and filed applying rates, regulations, and practices to avoid it. The commission further found

that the refusal of the Central Railroad of New Jersey and the Pennsylvania Railroad Company to establish creosoting-in-transit at Newark was not unreasonable in and of itself, permitting the carriers to determine if they would install the privilege at Newark or withdraw from tariffs which permitted it elsewhere.

The two carriers named and twenty-one others operating in Central Freight Association territory filed their joint petition alleging that even if they are parties to tariffs naming joint through rates under which other carriers also parties thereto have established creosoting-in-transit at local points on the latter's lines, petitioners have not established the privilege on their own lines, and have not participated in, or been consulted in connection with, the establishment of the privilege at points on the other lines.

The only alleged injury is that the appellants may not comply with the order except by installing the privilege at Newark, which will deprive them of the difference between the sum of the local rates applying to and from Newark and the joint rates; the expense of policing the practice, etc. (61 I. C. C. 149.) There is no objection to an additional transit charge similar to that made to competitors of American Creosoting Company (61 I. C. C. 146).

In allowing the appeal from the order denying application for preliminary injunction the District Court also signed certain findings with respect to alleged irreparable injuries and allowed a stay sus-

pending the commission's order for thirty days, within which time appellants should *present to the Supreme Court* an application for further suspension; otherwise the suspension to expire. (Tr. 28, 29.)

ARGUMENT.

The Interstate Commerce Commission stated the question presented to it for decision—

> is primarily one of alleged undue prejudice resulting from the granting of a creosoting-in-transit arrangement to complainant's competitors, and the denial of a similar arrangement to complainant. (61 I. C. C. 150.)

The Commission answered that question by finding—

> The Central and the Pennsylvania, as well as other defendants herein, are parties to joint rates on creosoted lumber applying through Newark under which transit is permitted at competing plants on the through routes, but is denied to complainant at Newark, and thereby they become effective instruments of discrimination. (61 I. C. C. 151.)

Counsel say:

> What they [appellants] are contending is that a carrier cannot be charged with discrimination unless it participates in that which is claimed to cause the discrimination. (Br. 17.)

Section 3 of the act to regulate commerce, as amended by Transportation Act 1920, provides (24 Stat. 380; 41 Stat. 479):

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * * *

All carriers, engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 15, as amended June 29, 1906, June 18, 1910, and by Transportation Act 1920, provides (34 Stat. 584; 36 Stat. 539; 41 Stat. 484):

That whenever, after full hearing, upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in

extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this act for the transportation of persons or property or for the transmission of messages as defined in the first section of this act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than

> the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Milling-in-transit, substitution-of-tonnage-in transit, reshipping, and many kindred practices, have been subjects of consideration by the Interstate Commerce Commission almost continuously since its organization. The reshipping privilege was once condemned as wholly illegal, and the carriers operating at Nashville and in southeastern territory were ordered to abolish the practice *in toto* as questionable under the penal statutes (16 I. C. C. 590, 595). Subsequently, on rehearings, the commission decided that its former order abolishing the reshipping privilege was too strict and remitted the subject to the shippers and carriers to formulate regulations which would continue the privilege and eliminate rebates. (18 I. C. C. 280.) New and satisfactory regulations were adopted to safeguard the privilege. (21 I. C. C. 183, 188.)

In further proceedings the commission found that the installation of the privilege at Nashville and the withholding of it from Atlanta and other Georgia points was a discrimination under section 3 and ordered the carriers to desist. This court sustained the order which was written in the alternative. (*United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, reversing Commerce Court, 191 Fed. Rep. 37; 197 Fed. Rep. 58.)

"In *The Five Per Cent Case* (31 I. C. C. 351, 408), we said that *transit is not part of the transportation service*, such as the expedited movement of freight, but '*something offered to the shipper in addition to the transportation service,*'" said the commission in *Southern Hardwood Traffic Assoc.* v. *Director General* (61 I. C. C. 139).

In transportation transit privileges, like the privilege to manufacture and sell alcoholic liquors, or to conduct a boxing exhibition (any of which may be prohibited entirely) are fraught with consequences of the most mischievous character unless carefully safeguarded.

In *Loomis* v. *Lehigh Valley R. R. Co.* (240 U. S. 43, 50), this court, speaking through Mr. Justice McReynolds, said:

> An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered.
>
> In the last analysis the instant cause presents a problem which directly concerns ratemaking and is peculiarly administrative. (*Atchison, Topeka & Santa Fe Ry.* v. *United States*, 232 U. S. 199, 220.) And the preservation of uniformity and prevention of discrimi-

> nation render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. (See *Penna. R. R.* v. *Puritan Coal Co., supra*, pp. 128, 129; *Penna. R. R.* v. *Clark Coal Co., supra*, pp. 469, 470.)

What constitutes undue prejudice is a question of fact exclusively for the Commission to determine. (*Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57.) Similarly with respect to the suggestion that compliance with the order will tend to incite complaints of undue prejudice from other sources.

In *Interstate Commerce Commission* v. *C., R. I. & P. Ry. Co.* (218 U. S. 88, 108, 110):

> * * * the commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new * * *. And it may be that there can not be an accommodation of all interests in one proceeding * * *. The order of the commission besides is strictly limited. It was intended to determine nothing, and it determines nothing but that the through rates on Atlantic seaboard shipments to the Missouri River cities are too high. That order is alone open to review. Whether other persons, cities, or areas of territory have grounds of complaint, the way is open by

> application to the commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the commission should first pass and of which the courts should not be called upon in advance to intimate an opinion. The reasons for this we have indicated, and they will be found at length in the cases which we have cited.

In *Manufacturers Railway Co.* v. *United States* (246 U. S. 457) the commission, *in the same proceeding*, filed at different times three separate reports, and each reached a conclusion at variance with those of the others. The final report fixed the switching allowance of the trunk lines to the switching road at $2.50 per car, which was assailed by the switching road as confiscatory. The District Court dismissed the bills on final decrees, and in affirming, this court, *inter alia*, said: (482.)

> In the present case the negative finding of the commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. (28 I. C. C. 104, 105; 32 I. C. C. 102.) The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed, the first report of the commission was to the contrary; but to annul the commission's order on this ground would

be to substitute the judgment of a court for the judgment of the commission upon a matter purely administrative, and this can not be done. (*United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361.)

Appellants concur with connecting lines in publishing tariffs of through routes and joint rates. Presumably they do that for the benefits and advantages they derive therefrom. In order to reap the rewards which flow from the interstate commerce acts with solidarity they stand united. They should be gauged in that way, and not disconnectedly, when injury results in applying those rates. To hold that single companies by specific acts may at favored places and in selected instances break that unification and solidarity, to the advantage of shippers at those favored places and to the *undue prejudice* of other shippers at unfavored places, is to annihilate the statute.

Appellants may not sustain the proposition that an undue prejudice created by the publishing of rates by joint action of the carriers may be justified by their separate action in the special application of those joint rates to particular circumstances.

Appellants assail the validity of section 3, *as construed by the Commission*, "as the Commission is attempting to force its establishment (creosoting-in-transit) by indirection, because (*a*) *connecting* lines have established it, and (*b*) because the appellants

are parties with these connecting lines to joint rates applying through Newark." (Br. 22.)

This argument assumes that undue prejudice may only result from the misuse of a single practice, i. e., different *rates* for shippers or localities similarly situated; milling-in-transit or creosoting-in-transit for one place and withholding it from another similarly situated; furnishing special equipment for one locality and withholding it from another similarly situated, etc. It further assumes that undue prejudice may not result from the joint action of carriers in publishing rates and the separate action of certain of those same carriers in allowing special privileges to certain favored localities in the use of those joint rates.

Moreover, as the commission drew the order in the alternative, it may fairly be assumed that the commission will accept compliance with the order in the manner in which it was drawn, i. e., by allowing either the withdrawal of the appellants from the through routes and joint rates or the installation of creosoting-in-transit at Newark.

Great Northern Railway Co. v. *Minnesota* (238 U. S. 340), relied on by counsel for appellants (Br. 19), rather sustains the order of the Commission in the instant case. The railway had installed 6-ton capacity stock scales at 54 of its 259 stock-shipping stations in Minnesota which were not used in transactions between carrier and shippers; the scales had no direct part in the transportation or selling at

terminal yards. Speaking for this court, Mr. Justice McReynolds said: (345, 346.)

> The business of a railroad is transportation and to supply the public with conveniences not connected therewith is no part of its ordinary duty. * * * Conceding power to inhibit discrimination the Commission could not exercise it unreasonably by needlessly taking property or, what comes to the same thing, obliging incurrence of expense wholly unnecessary. It by no means follows, simply because a railroad voluntarily supplies a convenience at some stations which attracts trade, that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The Commission's order precluded the use of this method to bring about lawful conditions and therein, we think, was plainly arbitrary and unreasonable. (*Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403, 417; *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 293; *Missouri Pacific Railway* v. *Nebraska*, 217 U. S. 196, 206.)

Counsel cite *Penn Refining Co.* v. *W. N. Y. & P. R. R. Co.* (208 U. S. 208) as holding that "even though the practice of one of the carriers under a joint rate is discriminatory, a connecting carrier, if it is

not a party to the practice, is not responsible, though it shares in revenue resulting therefrom." (Br. 18.)

That was a suit to recover overcharges growing out of alleged illegal practices of the railroad company in the transportation of oil during the period between May, 1894, and October, 1895. The whole theory of the discrimination rested upon the alleged failure to furnish tank cars to shippers demanding them, while at the same time the defendants leased tank cars from their owners and used them to carry the oil of such owners exclusively. The plaintiffs had made no demand for such cars for themselves and had no use for them. The Circuit Court left it "to the jury to find from them (the facts) whether there was 'undue discrimination' in favor of the shipper by tank cars and against the shipper by barrels." There was a verdict and judgment in the Circuit Court which the Court of Appeals reversed. The plaintiff lost the case on the merits. This Court affirmed the judgment of the Court of Appeals.

In the instant case the discrimination was not only found *by the Commission* but it is obvious to all. Counsel for appellants fail to take into account the enactment since the *Penn Refining case* arose in 1895 of the important amendments to the Act to Regulate Commerce in 1906 and in 1910, the Transportation Act, and the numerous opinions of this court construing the act as so amended and sustaining the enlarged powers of the Commission. (See *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452; *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88, 102; *Procter &*

Gamble Co. v. *United States*, 225 U. S. 282, 294, 295; *Intermountain Rate Cases*, 234 U. S. 476; *United States*, v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314.)

Counsel cite *Philadelphia & Reading Ry. Co.* v. *United States* (240 U. S. 334). In that case no undue discrimination against the shipper or the locality of its plant was found, the community declared to be prejudiced by the established conditions had not complained and was not a party to the proceeding, and the rate complained of was intrinsically reasonable; it was held that the mere fact that other carriers had adopted a lower schedule from the shipper's district to points other than the one designated afford no foundation for a finding by the Commission that such rate was unreasonable and erroneous as a matter of law.

Counsel fail in their endeavor to distinguish *St. Louis Southwestern Railway Co.* v. *United States* (245 U. S. 136), wherein this court said (144):

> Carriers insist also that the order is void on the ground, that since their "rails do not reach Paducah, they cannot be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And thereby they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from

> single carriers whose "rails" reach them. Clearly the power of Congress and of the commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. (*Cincinnati, New Orleans and Texas Pacific Railway Co.* v. *Interstate Commerce Commission, supra.*)

By a single order (Tr. 24) the District Court denied the application for preliminary injunction and overruled the motion filed by the United States to dismiss. (Tr. 20.)

That part of the order which denied the application for preliminary injunction should be affirmed.

That part of the order which overruled the motion of the United States to dismiss should be reversed with directions to sustain the motion and to dismiss the petition on final decree. (See *Los Angeles Switching Case*, 234 U. S. 294, 316; *Int. Com. Com.* v. *Baltimore & Ohio*, 225 U. S. 326, 346.)

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant Solicitor General.

NOVEMBER, 1921.

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No. 436 in Equity.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

WALTER MCFARLAND,
For Interstate Commerce Commission.
P. J. FARRELL,
Of Counsel.

OCTOBER, 1921.

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SUBJECT INDEX.

TABLE OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE CENTRAL RAILROAD COMPANY OF New Jersey et al., appellants,
v.
UNITED STATES OF AMERICA AND Interstate Commerce Commission.

No. 436, IN EQUITY.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

The American Creosoting Co. filed a complaint with the Interstate Commerce Commission, hereinafter called the Commission, which was docketed as No. 10582. The issues are described as follows at page 145 of the Commission's report in that proceeding (*American Creosoting Co.* v. *Director General*, 61 I. C. C. 145):

> Complainant is a corporation engaged in shipping carloads of lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks from points in southern classification territory to its plant at Newark, N. J., where they are creosoted and reshipped to points of consumption in official classification territory. For the movement of this material complainant pays the rates to and from Newark, whereas

its competitors in central territory and in the South have transit arrangements under which they can ship to the same points of consumption at the joint rates plus a transit charge. By its complaint filed March 24, 1919, as amended, complainant alleged that the denial to it of similar transit arrangements, which include the cutting of paving blocks into shape at the creosoting plant, resulted in charges which were unjust, unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 1, 2, and 3 of the act to regulate commerce and of section 10 of the Federal control act. It is contended that just and reasonable carload rates would be the joint rates from the points of origin to the final destinations of the creosoted articles where the joint rates apply via Newark, and that where the joint rates do not apply through Newark the said joint rates plus charges ranging from 2.5 cents for 30 miles and under to 30 cents for 500 miles for out-of-line or backhaul movements would be just and reasonable. No objection is made to an additional transit charge similar to that charged its competitors. We are asked to prescribe just and reasonable rates for the future. Rates are stated herein in cents per 100 pounds and do not include the increases authorized in *Increased Rates, 1920* (58 I. C. C. 220).

The case was duly heard and submitted by the parties, and on March 15, 1921, the Commission made its report, referred to above, together with an order making said report a part of the order. For a complete statement of the Commission's findings, the

court is respectfully referred to the Commission's report. In that report it was said, among other things:

> Complainant located its plant at Newark in 1910. Its principal competitors, most of whom constructed their plants since that time, are located in central territory, at Madison, Ill., Indianapolis, and Bloomington, Ind., and Toledo, Ohio. There are other competitors at Broadford Junction, Pa., and Simpson, Miss. All of these operate under transit rules which give them the benefit of the joint rates where they apply through the creosoting point, and some of them under rules which also authorize the application of the joint rates, plus out-of-line or back-haul charges, the same or substantially the same in amount as those sought by complainant, where the joint rate is not applicable through the creosoting point.
>
> * * * * *
>
> Competition is keen in the sale of creosoted wood products and especially so in the sale of wood paving blocks. Complainant sells its creosoted products on a margin of profit of about 5 per cent. It has lost many contracts on which it has bid at points in New England and in New York State, which its witness stated was because competitors having the transit arrangement were enabled to underbid it, due to the difference in freight rates. * * * The following rates, among others cited by complainant, illustrate the disadvantage to complainant by reason of the adjustment assailed. The rate from Meridian, Miss., and grouped points to Boston, Mass., on basis of which creosoting in transit is per-

mitted at the central territory points, is 43 cents, whereas complainant pays a rate of 53.5 cents from the same points to Boston, 39 cents to Newark, and 14.5 cents beyond. The joint rate from Meridian to New York is 39 cents, while the combination on Newark is 47 cents, 39 cents to Newark, and 8 cents beyond, resulting in a disadvantage to complainant, as compared with its central territory competitors of 8 cents. On shipments from Meridian to Portland, Me., complainant's central territory competitors have an advantage of 18.5 cents.

* * * * *

It is apparent that the question here presented is primarily one of alleged undue prejudice resulting from the granting of a creosoting-in-transit arrangement to complainant's competitors and the denial of a similar arrangement to complainant. The record establishes that on much traffic to points beyond Newark in eastern New York and in New England, which territory complainant asserts constitutes its natural market, it is unable, as to all-rail traffic at least, to meet the competition of creosoting plants in central territory by reason of the situation complained of. Complainant contends that so long as the Pennsylvania and the Central participate in joint rates under which the transit arrangement is allowed by the other lines they are necessarily chargeable with unjust discrimination and undue prejudice because they do not allow the arrangement at Newark on their own lines. On behalf of the Central and the

Pennsylvania it is urged that they are not in anywise interested in or chargeable with the allowance of these transit arrangements by connecting lines. Those two carriers rely strongly upon *Grain & Hay Exchange* v. *P. Co.* (32 I. C. C. 409), *Indianapolis Chamber of Commerce* v. *C., C., C. & St. L. Ry.* (34 I. C. C. 267), *Meridian Grain & Elevator Co.* v. *A. & V. Ry. Co.* (38 I. C. C. 478), and other cases involving somewhat similar situations in which complaints alleging undue prejudice were dismissed. Those cases, however, were considered in *Southern Hardwood Traffic Asso.* v. *Director General* (61 I. C. C. 132), decided this date, and found to be no longer controlling in view of the enlarged powers conferred upon us by the transportation act, 1920. In the case last cited we found that defendants' participation in tariffs carrying joint rates on lumber and forest products applying through Memphis, Tenn., or Louisville, Ky., and permitting in connection with such joint rates transit at certain points on the through routes, while contemporaneously denying similar transit at Louisville or Memphis, subjected the complainants therein to undue prejudice. The Central and the Pennsylvania, as well as other defendants herein, are parties to joint rates on creosoted lumber applying through Newark under which transit is permitted at competing plants on the through routes, but is denied to complainant at Newark, and thereby they become effective instruments of discrimination.

* * * * *

> Following *Southern Hardwood Traffic Asso.* v. *Director General, supra*, and upon the facts of record in this case, we find that the refusal of the Central and the Pennsylvania to establish creosoting-in-transit arrangements at Newark is not unreasonable, but that defendants, in so far as they respectively participate in tariffs carrying joint rates on lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks, applying through Newark from points in southern classification territory to points in northern New Jersey, eastern New York, and in New England, and permitting in connection with such joint rates creosoting in transit at Madison, Indianapolis, Bloomington, Toledo, or Simpson, while contemporaneously denying similar transit arrangements at Newark, subject complainant to undue prejudice and disadvantage.

The order of March 15, 1921, was directed not only against the Central Railroad Co. of New Jersey and the Pennsylvania Railroad Co., which have taken the principal part in resisting the order, but also against more than 20 other common carriers. It provided, in part:

> *And it appearing*, That the Commission has found in said report that the above-named defendants, in so far as they respectively participate in tariffs carrying joint rates applying through Newark, N. J., on lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks from points in southern classification territory to points in northern New Jersey, eastern New York, and in New Eng-

land, and permitting in connection with such joint rates creosoting in transit at Madison, Ill., Indianapolis, Ind., Bloomington, Ind., Toledo, Ohio, or Simpson, Miss., while contemporaneously denying similar transit arrangements at Newark, N. J., on the same through routes, subject complainant to undue prejudice:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 20, 1921, and thereafter to abstain, from the undue prejudice found in said report to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 20, 1921, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will avoid the undue prejudice found in said report to exist.

On June 27, 1921, a petition was filed in the United States District Court for the District of New Jersey by most of the defendants named in the Commission's order of March 15, 1921, seeking to have that order enjoined. The Commission filed its answer, and the United States a motion to dismiss the petition, and on July 2, 1921, a hearing was held on motion for an injunction and on motion to dismiss.

Thereupon the district court made an order to the following effect:

> 1. That the application for preliminary injunction made by the petitioners be, and the same is hereby, denied (to which ruling and order the petitioners except).
>
> 2. That the motion of the United States to dismiss the petition be, and the same is hereby, denied (to which ruling and order the United States excepts).

Petitioners then filed an assignment of errors and a petition for appeal to the Supreme Court of the United States. In connection with the petition for appeal they prayed—

> that upon such terms as to bond as this court may direct, an order issue staying and suspending the enforcement of said order of the Interstate Commerce Commission and restraining and enjoining the respondents or any or either of them from enforcing or attempting to enforce said order until your petitioners will have time to perfect their appeal and present to the Supreme Court of the United States an application for a preliminary suspension order pending the hearing of this appeal.

The district court allowed the appeal and entered an order reading in part as follows:

> It is further ordered that if the petitioners shall within thirty days from the date hereof perfect their appeal to the Supreme Court and also present to that court within such thirty days a petition for a preliminary suspension of the order of the Interstate Com-

> merce Commission, referred to in the petition for appeal, pending the determination of such appeal, * * * the said respondents be, and they hereby, are restrained and enjoined from enforcing or attempting to enforce the order of the Interstate Commerce Commission dated March 15, 1921, in American Creosoting Co. against Director General et al., I. C. C. Docket No. 10582, until such time as the Supreme Court of the United States shall determine said petition for a preliminary suspension of said order.

The assignments of error are very general in character and may be summarized as being a contention that the district court erred in not holding that the order of the Commission was invalid and in not enjoining its enforcement.

Subsequently the appellants filed their "Petition and motion by the appellants for the preliminary suspension pending appeal of the order of the Interstate Commerce Commission involved herein and argument on said motion."

The case is now pending decision upon appeal from the order of the district court denying a preliminary injunction and upon the above-mentioned "Petition and motion."

ARGUMENT.

1. The petition and motion for the preliminary suspension of the Commission's order of March 15, 1921, should be denied.

This point is covered in the brief filed by the United States and little need be added. The Commission calls attention to the fact that there is grave doubt, to say the least, whether a district court, after denying an injunction, can rely upon its general equity jurisdiction and issue an order restraining the enforcement of an order of the Commission, pending appeal to the Supreme Court of the United States, in view of the fact that the statutes applicable to such cases, 36 Stat., 539, and 38 Stat., 219, provide a specific procedure to be followed where it is sought to enjoin orders of the Commission.

In this case, as in others, the argument is made that great and irreparable injury will be done to the railroad corporations if they are required to obey the Commission's order, whereas no one can be injured if the enforcement of the order is stayed pending an appeal, upon the execution of a bond. This reasoning, which might hold good in private litigation between two individuals, is fallacious as applied to a suit to enjoin the Commission's order. In the latter case not only the litigants but the entire public are interested. The duty of the Commission to prevent and remove violations of the interstate commerce act is a continuing one, applying not only to this case but to all other cases which may be brought before it. Obviously, it is a source of

great embarrassment, in deciding other similar cases, to have the operation of one of its orders stayed pending appeal, even though the validity of that order has been upheld by the refusal to enjoin its enforcement. The rights of the carriers are sufficiently protected by the statute authorizing them to apply to the district court for an injunction; and if they are unable to show that an injunction should be issued, the Commission should not be hampered in its administration of the interstate commerce act and kindred acts by an order staying the operation of its order.

2. The appellants admit that the Commission's findings of fact are correct.

While there are vague intimations in the assignments of error that the Commission's findings were unsupported by facts disclosing a violation of the interstate commerce act, the appellants, in their "Petition and motion" referred to above, state that "The question presented is strictly one of law" and that "The carriers are not seeking court review of any administrative finding of the Interstate Commerce Commission." As set forth on page 5 of the "Petition and motion," the appellants conceive that—

> In this appeal, however, no question of fact is involved. The question is not whether any preference is undue but solely whether, as a matter of law, the Commission is right in holding that a violation of section 3 of the interstate commerce act, as amended, is disclosed because one carrier whose local practices are

> found reasonable does not change these local practices so as to conform to the local practices of another carrier with which it is a party to joint rates on the commodity in question.

The purpose of this is, apparently, to escape the force of the decisions of the Supreme Court making the findings of the Commission conclusive where supported by evidence. (*Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S., 452, 470; *Int. Comm. Comm.* v. *Union Pacific R. R.* 222 U. S. 541, 547; *Atchison Railway Co.* v. *United States*, 232 U. S. 199, 220; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320; and *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481, 488.) The following excerpt from *Procter & Gamble* v. *United States* (225 U. S. 282, 297) is typical:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so.

There is no question but what the American Creosoting Co. is injured by the denial of the transit arrangement at Newark while such transit arrangement is granted to competitors at other points on the through route over which the joint rate applies. On page 149 of the Commission's report, *supra*, it is pointed out that the creosoting company's disadvantage ranged from 8 cents to 18.5 cents per 100 pounds on shipments to typical points under the rates in effect prior to the publication of the increased rates authorized in *Increased Rates, 1920* (58 I. C. C. 220). Under the percentage increases there authorized the disparity is even more marked.

The products of the creosoting company are of relatively low value, are sold "on a margin of profit of about 5 per cent," and it is obvious that the disadvantage in freight rates is a serious and perhaps an insurmountable handicap.

3. What amounts to undue preference or prejudice is a question not of law, but of fact, with which the Commission was created to deal.

The principal purpose in enacting the interstate commerce act was to prevent and remove unjust discrimination and preference. See pages 182 and 215 of the report made in 1886 by a Senate committee, of which Senator Cullom was chairman, generally known as the Cullom report.

In *United States* v. *Louis. & Nash. R. R.* (235 U. S. 314, 320), the Supreme Court said:

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*

(215 U. S. 452), *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.* (220 U. S. 235), *Interstate Com. Com.* v. *Louisville & Nashville R. R.* (227 U. S. 88), it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. (*East Tenn. &c. Ry. Co.* v. *Interstate Comm. Comm.*, 181 U. S. 1, 23–29). And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise, since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

See also *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.* (204 U. S. 426, 439) and *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.* (218 U. S. 88, 102, 103, 110).

In *Manufacturers Ry. Co.* v. *United States* (246 U. S. 457, 481) the court said:

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

To the same effect, see *Pennsylvania Co.* v. *United States* (236 U. S. 351, 361) and *Int. Comm. Comm.* v. *Del., L. & W. R. R.* (220 U. S. 235, 255).

The position of the carriers is simply that, despite what the Commission may find to be the fact, it can not make a valid order to remove the undue prejudice for the reason that the transit services at points in central and southern territories are published in local tariffs of carriers reaching those points, to which tariffs Central Railroad Co. of New Jersey and the Pennsylvania are not parties.

In the district court the carriers relied upon certain decisions of the Commission which, they claimed,

were not consonant with the report in No. 10582, but we do not feel justified in consuming the court's time by summarizing, analyzing, and discussing these decisions in view of the fact that they have no bearing, as we see it, upon the question before the court, namely, Did the Commission exceed its authority in making the order in the *American Creosoting Co. case?*

Appellants also relied upon the opinion in *Penn Refining Co.* v. *West. N. Y. & P. R. R. Co.* (208 U. S. 208, 222), but an examination shows that there is no similarity between the facts in that case and those in the case at bar. Moreover, at the time the Commission made its decisions involved in the *Penn Refining Co. case* its findings of fact upon administrative questions, as such, were not conclusive.

4. The Commission's order can be obeyed by appellants.

Appellants said in their brief in the lower court, and the caption of the case also discloses, that —

> The petitioners [appellants here] include practically all the important railroad companies operating in what is known as Trunk Line and New England territory, which, roughly speaking, includes all that section of the United States east of a line drawn through Buffalo and Pittsburgh and north of the Potomac River.

The Commission found that undue prejudice existed and required all the defendants, not merely the Central Railroad and the Pennsylvania, according as

they participate in the transportation, to cease and desist from and to avoid such undue prejudice. It gave no direction as to the specific manner in which this should be done.

Appellants can comply with the order by pursuing any one of the following courses: (*a*) Establish the transit service at Newark; (*b*) cancel their participation in the joint rates through Newark; or (*c*) qualify their concurrence in such rates to joint rates through Newark in connection with which transit is not accorded at any point on the through route.

Many reasons have been advanced by appellants why they do not wish to obey the order. None has been given which shows that they can not obey. As stated above, they are the principal carriers in trunk line and New England rate territories, and without their cooperation it would be impossible to subject the American Creosoting Company at Newark to undue prejudice.

5. The order of the Commission is valid and should be sustained.

In this case it will be seen that wooden paving blocks, for example, move from points in the South through Newark to destinations in northern New Jersey, eastern New York, and in New England. The carriers conducting the transportation, including appellants, have joined in the establishment of joint through rates. If a shipment of paving blocks is treated at Madison, Ill., Indianapolis, Ind., or one of the other points named in the Commission's report and order at which the American Creosoting

Co.'s competitors are located, the joint rate is paid, plus the transit charge, if any, for the additional service at the transit point. If, on the other hand, the paving blocks are treated at Newark, the joint rate does not apply, there being no transit service authorized at that point, and the American Creosoting Co. is compelled to pay the much higher combination of the rates up to and beyond Newark.

There is no question as to the injury sustained by that company. The Commission has found that undue prejudice exists and has directed its removal.

Appellants resist the order on the ground that they are not parties to the local tariffs according transit in connection with the joint through rate at other points on the through route. They allege that to establish transit at Newark would result in depriving them of their property and also that it would be contrary to their policy regarding the establishment of transit.

With regard to the allegations concerning deprivation of property, a complete answer is that nothing in the Commission's order prevents the appellants from making a reasonable charge for the transit service if they elect to obey the order by establishing transit at Newark. The court's attention is also invited to the fact that under section 15a of the interstate commerce act the Commission is required to initiate rates which will yield to carriers in rate groups established by the Commission a fair return upon the aggregate value of their railroad property in the respective groups devoted to the public service.

In *Increased Rates, 1920, supra,* the appellants, among other carriers, were accorded greatly increased rates.

The fact that a carrier has a certain policy can have no bearing upon its duty to obey the statute and lawful orders made pursuant thereto. Otherwise the rights of the public would depend upon the whims of the carriers and conditions would be intolerable, particularly where, as here, different carriers have conflicting policies.

The appellants have, collectively, made possible the undue prejudice against the American Creosoting Co. Collectively they can, beyond question, remove such undue prejudice. That is, if the transit service is established at Newark, both the American Creosoting Co. and its now favored competitors can ship on the basis of the joint through rates, plus transit charges, if any; while if the joint rates through Newark are cancelled or concurrence in such rates is limited to joint rates in connection with which no transit is permitted all parties must pay the higher combination rates.

The question before the court is, Does the fact that appellants do not participate in the local transit tariffs, according to the transit service in connection with the joint through rates, render invalid an otherwise valid order of the Commission and make it impossible to remove undue prejudice resulting from the concerted action of a number of carriers, although such undue prejudice could be removed if only one carrier were involved?

While it is true that appellants do not publish the transit services accorded to the American Creosoting Co.'s favored competitors, it is equally true that their partners in the joint through rates do publish them and that by continuing to participate in the joint through rates appellants have made possible, and have made themselves effective instrumentalities in the execution of, the undue prejudice condemned by the Commission.

In speaking of section 3 of the interstate commerce act the Supreme Court said, in *Houston & Texas Ry.* v. *United States* (234 U. S. 342, 356):

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.

And in *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry., supra*, the court said (pp. 102, 103):

> The Commission was instituted to prevent discrimination between persons and places. * * * The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result, this court has taken occasion to characterize. "They assail," it was said, "the

> wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in the performance of the administrative functions vested in it, and upon such assumption invoke the exercise of an unwarranted judicial power to correct the assumed evils." (*Interstate Commerce Commission* v. *Illinois Central Railway Company*, 215 U. S. 452, 478.)

While not identical as to the facts, the Commission believes that the case of *St. Louis S. W. Ry. Co.* v. *United States* (245 U. S. 136), is controlling in principle. In that case it appeared that there were through routes and through rates on logs and lumber to Paducah, Ky., from the southwest. To Paducah the rate was 22 cents per 100 pounds, which was 6 cents more than the rate to Cairo, Ill. The Commission concluded that the carriers should establish and maintain through routes to Paducah via either Memphis, Tenn., or Cairo, and joint rates "not in excess of the rates at present in effect * * * to Cairo."

In the course of its opinion the court said, page 144:

> Carriers insist also that the order is void on the ground that, since their "rails do not reach Paducah, they can not be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois

> Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it.

The Commission's report and order were not made arbitrarily, but with evidence to support them, and the Commission did not exceed the authority conferred upon it. It is respectfully submitted that the order of the district court denying the preliminary injunction should be affirmed.

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